In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 904

CHARLES R. NESBITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. XVI–XX) is reported at 345 F. 2d 583.

JURISDICTION

The judgment of the Court of Claims was entered May 14, 1965. A timely motion for rehearing was denied on October 15, 1965. The petition for a writ of certiorari was filed on January 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the United States is liable for loss of anticipated profits upon breach of contracts contain-

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ing a provision for termination when in the best interests of the government, where such provision was not invoked at the time of termination.

STATEMENT

Petitioner seeks review in this Court of a decision of the Court of Claims holding that the United States was not liable for unearned but anticipated profits upon partial cancellation of two contracts containing termination for the convenience of the government clauses even though such clauses were not expressly invoked at the time of cancellation. The contracts in question were entered into in 1956 by the Corps of Engineers and petitioner, a member of the Oklahoma bar. Under the contracts petitioner undertook to furnish certificates of title and title insurance on tracts of land which the federal government was acquiring in connection with two dam and reservoir projects. Petitioner was to be paid at a fixed rate per certificate and undertook to furnish not less than five certificates (subsequently increased to 10) per week provided that that many orders were placed by the government. The contract set forth estimates of the number of certificates that would be needed, but also specified that "the contracting officer may reduce or increase the total number of certificates of title to be ordered and delivered" (Pet. App. xxiii). The contract ran to June 30, 1961, but would terminate on any intervening June 30 unless the government exercised its option of renewal. The contracts also provided for termination "in whole, or from time to time in part, whenever the contracting officer shall

determine that such termination is in the best interests of the Government" (Pet. App. xxxv).

Through the end of fiscal year year 1959 the government ordered from petitioner all of the certificates needed in connection with the two projects. During the last half of fiscal year 1959 the government increased the rate at which it was ordering certificates, and a considerable backlog of unfilled orders began to accumulate although petitioner continued to supply the minimum of five per week specified in each contract.[1] In light of this backlog, in negotiations at the end of fiscal year 1959, the government urged petitioner to increase his rate of supply from five to 30 certificates per week. This petitioner refused to do without an increase in the price per certificate. Petitioner did agree to increase his minimum guaranteed deliveries to 10 certificates per week, and this change was adopted in both contracts for fiscal year 1960. However, the government informed petitioner that in order to fill its requirements it would have to accept bids from other suppliers (Pet. App. xxxv). In August 1959 the government entered into four contracts with a new supplier to fill its additional requirements for certificates in connection with the two projects.

Petitioner commenced this action in August 1961, claiming that it was a breach of contract for the gov-

[1] This increased rate of orders for certificates of title was necessary to permit the federal district court to disburse funds under 40 U.S.C. 258a *et seq.*, to persons who were being dispossessed of their lands in condemnation proceedings for the two projects.

ernment to place orders for certificates with any other supplier and that the contracts were intended to cover the "total requirements" of the government for certificates in connection with the two projects for fiscal year 1960, even though petitioner was obliged to supply no more than ten certificates per week under each contract. Petitioner did not seek to prove any unreimbursed costs as a consequence of the alleged breach, but confined his claim to the profits he would have realized had he received the orders which were placed elsewhere (Pet. App. xl). The Trial Commissioner and the Court of Claims found that "[t]here was nothing in either contract by express language which obligated the defendant to purchase all of its requirements from plaintiff" (Pet. App. iii, xxii), and the government "acted on the assumption * * * that the contracts were not 'requirements' but 'indefinite quantities' agreements, allowing the Government to order elsewhere at will" (Pet. App. xvii–xviii).

The Court of Claims found it unnecessary, however, to decide whether, under the two contracts, petitioner had been entitled to receive orders for the government's entire requirements in connection with the two projects. It held instead that petitioner's claim was untenable since, under the termination for the convenience of the government clause, the government was entitled to terminate the contracts "*in whole, or from time to time in part*" (Pet. App. xvii). Relying on the authority of *College Point Boat Co.* v. *United States*, 267 U.S. 12, the Court of Claims also held that, although the government had not invoked the ter-

mination for convenience clause (because it had acted on the assumption that the contracts were not requirements agreements), the clause "nevertheless sets the limit to any possible recovery" and precludes recovery of anticipated profits (Pet. App. xviii–xix).

ARGUMENT

The decision of the Court of Claims is correct. It is consistent with other decisions of that court and does not conflict with any decision of this Court. Consequently, further review is not warranted.

The decision of the Court of Claims makes it clear, and petitioner does not dispute, that the circumstances surrounding the performance under the contracts justified either a partial or total termination as being "in the best interests of the Government." The court below pointed out that the government was concerned about the backlog of its unfilled needs for title certificates and title insurance on the two projects, and had discussed with petitioner its requirement for much greater production (Pet. App. xix). Although petitioner raised his minimum from five certificates a week to 10, this was still considerably less than the government's stated requirements. As the Court of Claims found (Pet. App. xix, n. 3), "In these circumstances, the contracting officer would undoubtedly have had the power, under the termination article, to exercise the Government's right to terminate the plaintiff's full rights, in order to be free to place orders with other suppliers. *John Reiner & Co., supra,* * * *, 325 F. 2d at 442–43."

The foregoing circumstances clearly bring this case within the ambit of the Court's decision in *College Point Boat Co.* v. *United States*, 267 U.S. 12. In that case, the Navy took steps to halt production under a contract without exercising any right of termination reserved in the contract, and without knowledge that it had such authority under statute. There, as here, the Department "failed to give the notice requisite to terminate the contract" (267 U.S. at 15). This Court held that, although the stoppage of performance was an anticipatory breach, the Navy's right of cancellation precluded the recovery of prospective profits. And that was true even though the right of cancellation had not been invoked prior to the commencement of the suit (267 U.S. at 15–16):

> * * * A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later. * * *

In the present case, no less than in *College Point Boat Co.*, an adequate basis for termination existed in the termination for convenience clause; it could be asserted as a defense in petitioner's action for breach even on the assumption that it had not been invoked previously; and it "operated to curtail the damages recoverable" (267 U.S. at 16) to those authorized by the termination clause (Pet. App. xix–xx). See,

also, *John Reiner & Co.* v. *United States*, 325 F. 2d 438 (C. Cl.), certiorari denied, 377 U.S. 931.

Petitioner seeks to distinguish *College Point Boat Co.* and similar decisions on the ground that the government never notified petitioner that he was "to any definable extent * * * partially relieved of his performance obligations under the agreement" (Pet. 12). Petitioner overlooks the finding of the Commissioner and the Court of Claims that he was told by the government that "it would have to let bids to other suppliers" in order to fill its requirements (Pet. App. x, xxxv). Petitioner also overlooks the fact that his obligation under each agreement was limited to supplying 10 certificates per week in fiscal year 1960, that he delivered 1302 certificates in that year (Pet. App. xxxvii), and that he did not seek to prove that he had sustained any reimbursed costs pursuant to those obligations (Pet. App. xl).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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